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**Supreme Court of the United States**

**OCTOBER TERM, 1947**

**12**  
**No. 1551**

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**VIRGIL T. BRINEGAR, PETITIONER,**

*vs.*

**THE UNITED STATES OF AMERICA**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED JANUARY 27, 1948.**

**CERTIORARI GRANTED MARCH 8, 1948.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 551

VIRGIL T. BRINEGAR, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 25, 1948.

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[fol. a]

[Caption omitted]

[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES  
IN AND FOR THE NORTHERN DISTRICT OF  
OKLAHOMA**

No. 11307—Criminal

UNITED STATES OF AMERICA, Plaintiff, ●

VS.

VIRGIL T. BRINEGAR; Defendant

INFORMATION,—Filed March 5, 1947

(T. 27 U. S. C. A. 223)

The United States Attorney for the Northern District of Oklahoma charges:

On or about the 3rd day of March, 1947, Virgil T. Brinegar did import twelve (12) cases of assorted taxpaid intoxicating liquor from a point in the State of Missouri to a point in Ottawa County, Oklahoma, in the Northern Judicial District of Oklahoma, such intoxicating liquor not being accompanied by such permit, or permits, license or licenses, therefor as required by the State of Oklahoma, being a state in which all sales and all importation, bringing into, or transportation therein of intoxicating liquor containing more than 4% alcohol by volume are prohibited.

Whit Y. Mauzy, United States Attorney, Kenneth G. Hughes, Assistant U. S. Attorney.



[fol. 2] STATE OF OKLAHOMA,  
County of Tulsa, ss:

Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma, being first duly sworn, and having read the above and foregoing Information states that the facts contained therein are true and correct as he verily believes.

Kenneth G. Hughes.

Subscribed and sworn to before me this 5th day of March, 1947. M. M. Ewing, Deputy Court Clerk.

IN UNITED STATES DISTRICT COURT

MOTION TO SUPPRESS EVIDENCE—Filed May 5, 1947

Virgil Thomas Brinegar hereby moves this Court that the evidence in the above styled and numbered case, wherein One 1946 Ford Coupe, Motor No. IGA-270574 and 36 Gallons of Assorted Taxpaid Whiskey was unlawfully seized on the 3rd day of March, 1947, at a point three miles east of Quapaw, Ottawa County, Oklahoma, by two Investigators of the Alcohol Tax Unit, Bureau of Internal Revenue, be suppressed against him in said criminal proceeding, for the reason that said seizure was made against his will and without a search warrant.

Paul O. Simms, Attorney for Defendant.

Service of copy acknowledged, 5-5-47, Kenneth G. Hughes, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF DENIAL OF MOTION TO SUPPRESS AND DISMISS—May 9, 1947

Enter hearing on motion to suppress evidence and dismiss. Defendant present in person and represented by Counsel, Paul Simms—All witnesses sworn—Plaintiff's witnesses—Plaintiff rests. Enter order overruling Motion

[fol. 3] to Suppress Evidence and dismiss—Defendant arraigned and enters plea of not guilty. Defendant requests Jury trial—Case set for trial on Tuesday, May 13, 1947.

(RHS—Judge.)

# IN UNITED STATES DISTRICT COURT

## MINUTE ENTRY OF TRIAL—May 13, 1947

Case called for trial—Defendant present in person and represented by Paul Simms and Harry Seaton—Announce ready—Jury sworn as to qualifications—Challenged by Defendant C. V. Sellers and Curtis A. Bryan. Government waives challenges. Jury sworn to try cause: Fred C. Downs, Leslie B. Burg, William D. Scott, Charles H. Ross, Olen W. Lloyd, R. L. Oldham, A. B. Chappell, Thomas J. Derwin, Carl J. Senger, Peter P. Hancher, Dolph C. Packard, A. B. Capps. Opening statements made. All witnesses sworn in open court. Plaintiff's witnesses: John H. Maulsett, Mark H. Crehan, John Reed, Henry R. Smith, F. B. Kirkes. Government rests. Defendant moves for acquittal—overruled. Defendant's witnesses: Virgil T. Brinegar. Defendant rests. Both sides rest. Defendant moves for acquittal—overruled. Closing statements made. Jury instructed and retires for deliberation. Jury returns verdict finding defendant guilty—verdict received and filed in open court—Jury discharged. Judgment and sentence passed to Friday, May 16, 1947.

(RHS—Judge.)

# IN UNITED STATES DISTRICT COURT

## VERDICT—May 13, 1947

We, the jury in the above-entitled cause, duly empaneled and sworn, upon our oaths, find the defendant Virgil T. Brinegar is guilty, as charged in the indictment.

A. B. Chappell, Foreman.

Filed in Open Court May 13, 1947.

[fol. 4]

## IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—May 13, 1947

On this 13th day of May, 1947, came the attorney for the government and the defendant appeared in person and by counsel, Paul Simms and Harry Seaton.

It is adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of transporting twelve (12) cases of assorted tax-paid intoxicating liquor from a point in the State of Missouri, to a point in Ottawa County, Oklahoma, in the Northern Judicial District of Oklahoma, such intoxicating liquor not being accompanied by such permit, or permits, license or licenses, therefore as required by the State of Oklahoma (Title, 27, U. S. C. A., Sec. 223), as charged in count one of the information, and sentence having been passed to May 16, 1947; Now on this 16th day of May, 1947, the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Thirty (30) days and pay a fine unto the United States of America in the sum of One Hundred (\$100.00) Dollars and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is adjudged that execution of sentence be stayed until May 23, 1947, at 10:00 A. M.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Royce H. Savage, United States District Judge.

[fol. 5] O. K. as to form: Kenneth G. Hughes, Asst. U. S. Atty.

Filed May 20, 1947.

## IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE TENTH CIRCUIT—Filed May 23, 1947

1. The name and address of the appellant is Virgil T. Brinegar, Vinita, Oklahoma.

2. The names and address of appellant's attorneys are Paul O. Simms, Vinita, Oklahoma, and Harry Seaton, 717 Ritz Building, Tulsa, Oklahoma.

3. The offense is the importation of twelve cases of assorted taxpaid, intoxicating liquor from the State of Missouri to a point in Ottawa County, Oklahoma, in the Northern District of Oklahoma.

4. Concise statement of judgment: Judgment rendered May 16, 1947, sentencing the said appellant to Thirty Days and \$100.00 fine; said appellant to be confined in an institution designated by the Attorney General of the United States; appellant now at large on bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit, from the above stated judgment.

Dated May 22, 1947.

Virgil T. Brinegar, Appellant. Paul O. Simms,  
Harry Seaton, Attorneys for Appellant.

Clerk's Statement.—Docket reflects copy of Notice of Appeal served on Whit Y. Mauzy, U. S. Attorney, May 23, 1947.

[fol. 6] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME WITHIN WHICH TO FILE AND DOCKET  
APPEAL—Filed June 25, 1947

Now on this 25th day of June 1947, pursuant to Rule 39(c), for good cause shown the Court does hereby extend the time for filing the record on appeal with the United States Circuit Court of Appeals for the Tenth Circuit and



the cause or proceedings therein docketed for an additional 30 days from this date.

Dated this 25th day of June, 1947.

Royce H. Savage, District Judge.

Service of copy of Order acknowledged 6-25-47. Kenneth G. Hughes, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

**Condensed and Narrated Statement of Evidence on Defendant's Motion to Suppress—Filed July 15, 1947**

Be it remembered that on the 9th day of May, A. D., 1947, in the above-designated Court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for hearing upon defendant's motion to suppress.

APPEARANCES

The plaintiff was represented by Whit Y. Mauzy, United States Attorney, and by Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma, Attorneys and Counselors at Law, of the State of Oklahoma.

The defendant was present in person and represented by Paul O. Simms, Esq., Attorney and Counselor at Law, of Vinita, Oklahoma.

[fol. 7] Thereupon the following proceedings were had to-wit:

The testimony of VIRGIL T. BRINEGAR, offered by movant, on his own behalf, and received in evidence was in substance and effect as follows:

Direct examination:

My name is Virgil Thomas Brinegar. On or about the 3rd day of March, 1947, while driving a 1946 Ford Coupe, I was apprehended by Agents of the Alcohol Tax Unit. My car was searched at that time. I did not give consent to the search of the car. This search was made about three

miles east of Quapaw, Oklahoma. No search warrant was served on me at the time. I never did give consent to the search of the car.

After the car was searched, the officer took the car and everything that was in it; there was some whiskey in the car which the officers seized.

I don't know the names of the two Federal Officers. I believe the officers were from Kansas.

#### Cross-examination:

I don't know the dates exactly. I suppose it was on the 3rd of March, 1947. I think there were somewhere around ten or eleven cases of whiskey in the car; ten cases in the cases and some in the lugs. I first saw the Federal Agents' car at the bridge. They asked me, "How much whiskey have you got in there?" I said, "Not too much."

I had been in Joplin that day. The officers followed me from the bridge to where they caught me; I would say a distance of half a mile or three-quarters possibly. There was a case of whiskey in the front seat of the car, but it was covered up with a laprobe. The remainder of the whiskey was under the front seat. This Ford Coupe was a Merchant's Coupe—the seat just raises up, that is the back of the seat raises up on hinges and there is quite a space in there. The whiskey that was in the car belonged to me.

[fol. 8] The testimony of JOHN A. MALSED, offered on behalf of the Government, and received in evidence was in substance and effect as follows:

#### Direct examination:

My name is John A. Malsed. I am an Investigator, Alcohol Tax Unit. My post of duty is at Pittsburg, Kansas. On March 3, 1947, I was working on the north edge of the State of Oklahoma. Special Investigator Creehan was with me; I saw the defendant, Virgil Brinegar, on that date. As to how long I had known Virgil Brinegar, well we arrested him on September 30, 1946, for hauling liquor. I have seen him in Joplin loading liquor into an automobile on occasions other than the time I arrested him. I have known him for some time as a man hauling liquor.

We were sitting on the side of the road about a quarter

of a mile east of the Quapaw bridge. The road runs east and west. We saw Mr. Brinegar coming down the road in this Ford Coupe. We first saw the Brinegar car about a mile back where the road turns—I mean a mile east of where we were sitting. I first recognized Mr. Brinegar as the driver when he passed. I had seen him in that same automobile before.

Q. Did his car appear to be heavily loaded or did it appear to have any load in it at all?

A. Yes, it was loaded.

Q. You immediately started chasing him, did you not?

A. That's right.

When he passed us I told Investigator Creehan that it was Mr. Brinegar—Creehan was driving the car—we started to follow Mr. Brinegar here, and Brinegar then increased his speed, and you go just—from where we were sitting I imagine you go possibly an eighth of a mile, and you make a curve and then another curve to go over the bridge. They are both sharp curves. Mr. Brinegar took those curves rather fast, and at the time I thought possibly he might hit the bridge, because of his speed, but he got on the bridge and crossed the bridge, and then from—on the west side of the bridge you go west a short distance and you make a curve and [fol. 9] then another curve, and then finally you curve north and down a hill, and then come up another hill, on that hill is another curve, and on that place his car began skidding and he slowed down. Up to that point we were not gaining on Mr. Brinegar at all, although our car was going as fast as it could, but when he went around that curve we were able to gain on him, and pull alongside of him, where Mr. Creehan sounded the siren, and Mr. Brinegar kept on a little ways further, and then finally stopped in the side of the road there almost in the ditch.

I got out of the car. I asked Brinegar; I said, "How much liquor have you got in the car this time?"; he says, "Oh, not so much" or something of that nature.

Mr. Brinegar: "Not too much, I said."

Then when I finally questioned him, and he said and told me finally that there was about twelve cases in the car. However, there was one case of Schenley's that was on the floor of the car, at the rider's seat—at the passenger's

seat there, not covered up; it was perfectly clear; I could see it was Schenley's; never did disturb it. Then there was a bottle, I think that he was drinking out of in the seat, and the rest of it was then underneath and back of the seat, as you lift it up. I arrested Mr. Brinegar then after I found whiskey in the car. There were thirteen cases and I believe one or two bottles of whiskey in the car.

Cross-examination:

At the time Mr. Brinegar came by me I knew the car, and I knew Mr. Brinegar. I had arrested him once before. That case was not disposed of; it is pending in Missouri at the present time; he has been indicted by the Federal Grand Jury at Kansas City.

This thirteen cases of liquor were in pints and fifths—I just believe pints and fifths were all there were. A case of fifths will weigh about forty-two pounds and pints forty-eight to fifty pounds. The liquor was in the center of the car and not in the turtle back. The weight would be in the center of the car.

The Court: "Well, Mr. Simms, this witness has not testified that the springs were sagging or anything of that [fol. 10] sort. I don't think his testimony tends to indicate that the car had such an appearance as to afford probable cause. He just said that it appeared to be heavily loaded."

Mr. Simms: "Heavily loaded. And that is what I was——"

The Court: "Well, that is not enough in my judgment unless you can describe that more particularly, the appearance which would constitute probable cause. I am going to assume that the appearance of the car, based on his statement that it was heavily loaded, is not enough to constitute probable cause."

The conversation I had with Mr. Brinegar at the time that I stopped him was similar to what I said; I went up and I ask him—he knew me. I says, "Brinegar, how much liquor have you got in the car at this time?" and he said to the effect, "Not so much" or something of that type. He was sitting in the car at the time. I asked him where he had gotten the liquor. I asked him if he had gotten it at Springfield; the liquor that was in the front seat was not covered. You could see the case very easily. It was a Schenley case.



Q. "Had you arrested Mr. Brinegar at that time, when you came up you arrested him, placed him under arrest?"

A. No, I had not arrested him at that time.

Q. When did you place him under arrest?

A. Oh, I don't know, just about when it was we did place him under arrest, I couldn't say exactly.

Q. But he never gave you consent to search the car?

A. No, I didn't ask his consent to search the car.

Q. You had no search warrant?

A. No, we had no search warrant.

The testimony of MARK H. CREEHAN, offered by the Government and received in evidence, was in substance and effect as follows:

My name is Mark H. Creehan. I am a Special Investigator, Alcohol Tax Unit, Kansas City, Missouri. I was present with Mr. Malsed at the time on March 3, 1947, [fol. 11] when we gave chase to and apprehended Virgil Brinegar. We first discovered Mr. Brinegar at about 6:00 p. m., while parked on this road as described by Mr. Malsed. I looked through the rear vision mirror and saw a car rounding the curve about a mile east of our position. As this car passed I saw the car was heavily loaded, and weighted with something.

As he passed us he increased his speed at that moment, and we gave chase; we chased him for about a mile and as I was unable to go up along side of his car; I sounded my siren. He continued and I was forced to push him over to the side of the road before he would stop.

After I stopped I did not immediately have any conversation with him. The conversation took place principally with Investigator Malsed. I heard that conversation. The conversation was substantially as related by Mr. Malsed.

#### Cross-examination:

Upon stopping Mr. Brinegar I did not look in the turtle-back of the car, first—neither one of us looked in the back end of the car at that time. Yes, sir, we did later. I did not recognize Brinegar when he came up to where we were sitting, because I personally didn't know the man. I followed Mr. Brinegar upon information that I received from Mr. Malsed. That was the first time I had ever seen

Brinegar. The road is pretty crooked there at the bridge. It is a gravel road and there was a number of curves. I would say that it was approximately one mile from the place that I first saw Brinegar until we apprehended him.

Q. You didn't have a search warrant?

A. No, sir.

Q. And he did not give consent for the search of the car?

A. I don't know whether you term this consent. He was asked where the liquor was and he said behind the seat.

Q. Was that after you had begun to search the car?

A. No, that was after the question was asked, how much liquor he had; and he said approximately twelve cases.

Q. He said approximately twelve cases?

[fol. 12] A. Yes, sir, he didn't make that statement at first, sir, he said a little liquor; he said I have got a little liquor.

#### Redirect examination:

Q. And did he say, "Not too much"?

A. "Not too much," it was along that line.

Q. Mr. Creehan, you stated that you followed this car as a result of the information received from Mr. Malsed. I will ask you whether or not the load of the car and the fact that he increased his speed immediately on passing you gentlemen also entered into your chasing.

A. I called the condition of the car to Mr. Malsed's attention, practically simultaneous the statement was made or the information was imparted to me by Malsed—

Q. And you took after him as the result?

A. That's true.

Q. This statement that he made that the whisky was behind the seat was before you ever gave him any indication that you intended to place him under arrest, is that right?

A. That's true, sir.

#### Cross-examination:

As to whether the car showed to be heavily loaded—it was weighted; you could see that it was weighted with something. No, I wouldn't say the backend was down, but it just had the appearance of being heavily weighted. This liquor was behind the driver's seat in sort of a compartment, and I would say to the middle and somewhat to the rear of the car.

The Court: The witness has already stated there was no appearance in the rear that indicated—that the car was heavily loaded. Usually the testimony is that the springs were sagging and so on, but we don't have that in this case. (Testimony closed.)

#### COLLOQUY BETWEEN COURT AND COUNSEL

Thereupon the following proceedings were had in substance and effect:

The Court: What do you think about this case, Mr. Hughes?

Mr. Hughes: If Your Honor please, my idea about it is that there is very little question but what the search is [fol. 13] good under the circumstances, primarily for this reason: That Mr. Malsed on numerous occasions had seen Mr. Brinegar; they chased him theretofore and had arrested him one time before. The point I make is that Mr. Malsed was fully familiar with who Brinegar was, when he came down the road. In this case we don't have a question of an informant from a particular unknown source. In this particular instance the agent himself knew the man, without the necessity of an informant. The car appeared to be heavily weighted; knowing where he was and the direction from where he was coming; this was only about three or four miles, as I understand, from the Missouri line, and when they gave any sign of moving off after him, he immediately took off in an attempt to out-run them. And then too, after he was finally stopped he makes the admission that he has possession of whiskey before they make any attempt to search his car.

The Court: Well, I think that is what it turns on. It is my judgment that the mere fact that the agents knew that this defendant was engaged in hauling whiskey, even coupled with the statement that the car appeared to be weighted, would not be probable cause for the search of this car. To so hold would in effect be to say to the officers that they may just make a search of the automobiles of known bootleggers on sight; that is about what it would amount to in my judgment. But the statements of the defendant made in themselves would constitute probable cause for the search. The only question in my mind is whether statements made under the circumstances that these were made would justify the search. Now, you understand he

was followed by these officers and they ran him off the road and made him stop. Now, I am inclined to think that he was in legal contemplation under arrest at the time they were having their conversation with him and if he was, the arrest was probably unlawful. There was not probable cause for the arrest in the first place. Now, I never have been able to satisfy my mind just what position we are in where the statements made by a party which would afford probable cause for a search are made while in custody pursuant to an unlawful arrest.

[fol.14] Mr. Hughes: If Your Honor please, in connection with that I have a case here from the Tenth Circuit, 159 Fed. (2), 85, Morgan against the United States. (Here case was quoted) And I don't know really how a case could be more clearly exactly like this one.

The Court: I don't either. The only thing it raises the question in my mind about the person not being under arrest. It looks like when they chase somebody a mile and run them off the road to make them stop that you have got an arrest. When do you arrest a party?

Mr. Hughes: Of course, that is a question that I think is going to be impossible to determine at any time is actually when a man is under arrest.

Mr. Simms: He ceased to go of his own free will at the time the officers stopped him if the Court please.

The Court: Of course, that point is not discussed.

Mr. Hughes: It is discussed only to this extent—

The Court: He just said he was not under arrest. The Court says he was not under arrest.

Mr. Hughes: These officers were sitting along the side of the road.

The Court: They stopped him.

Mr. Hughes: I might read this: "When they drove to a wye on the highway about six miles south of town, where the car in question shortly passed them, going toward Lawton. They drove up alongside of the car and recognized Morgan as the driver." That is exactly what happened in this situation. "They stopped him." Now, whether they stopped him by what means they still stopped him.

The Court: That's right.

Mr. Hughes: "And Pauly got out of the car and Mogridge drove the officers' car in front of the Morgan car." In other words, they drove the car in front of the car so that it



would make it impossible for him to leave the scene. And the court holds that at that time he was not under arrest.

Mr. Simms: I have not read the case but my remembrance is that there was something, that he was not voluntarily talk- [fol. 15] ing to them here, if the court please.

The Court: Your client voluntarily talked—

Mr. Simms: There had not been nothing, why they had stopped him and drove him into the road, as to the matter of arrest—

#### DENIAL OF MOTION TO SUPPRESS

The Court: They were stopped in this case. Of course I am—personally it is my view that some court some day is going to hold that when the officer takes in after an automobile and forces it off the highway and stops him, and then engages the party in conversation, that that party is under arrest. I think that he is under arrest when they stop him, even though they don't say, "You are under arrest"—don't serve a warrant—they don't have a warrant. But I don't see any escape from it. I don't know of any case though where a court has actually passed on the question.

Now, this is what I am talking about—whether statements voluntarily made by a party unlawfully arrested may be considered in determining whether there is a probable cause for a search. Assume that this defendant was under arrest at the time he made the statement and that the arrest was unlawful, there was no probable cause for the arrest, then there is still a question as to whether those statements might be considered in determining the probable cause. I don't know of any case that holds that they may not; in fact I don't know of any court that has passed on that question, but this case is squarely in point, I agree with you; I don't see how the case can be distinguished. And the court does make the statement, although apparently there was no particular point made of it, he does make the statement that the party was not under arrest, although he had been forced to stop by the officers. And while I might be inclined to disagree with that statement, that does constitute an arrest. As I said heretofore, I find when I disagree with the Circuit Court, their view always prevails, so I am going to go along with them. Motion will be overruled.

Mr. Simms: Give us an exception.

[fol. 16] IN UNITED STATES DISTRICT COURT

**Narrative Statement of Testimony at Trial—Filed July 15, 1947**

Be it remembered that on the 13th day of May, A. D. 1947, in the above-designated Court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for trial to a jury.

**APPEARANCES**

The United States was represented by Whit Y. Mauzy, United States Attorney for the Northern District of the State of Oklahoma, Attorney and Counselor at Law, of Tulsa, Oklahoma, and by Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma, Attorney and Counselor at Law, of Tulsa, Oklahoma.

The defendant was present in person, and represented by Paul O. Simms, Esq., of Vinita, Oklahoma, and Harry Seaton, Esq., of Tulsa, Oklahoma, Attorneys and Counselors at Law.

And thereupon the following proceedings were had, to-wit:

The twelve jurors were called into the box, statement made by the Court, jury was sworn and opening statement made by Government Counsel.

The testimony of JOHN A. MALSED, offered by the Government, and received in evidence was in substance and effect as follows:

**Direct examination:**

Mr. Seaton: Comes now the defendant and objects to the introduction of any evidence for the reason that any evidence that was obtained in this case was obtained in violation of the fourth and fifth amendments to the constitution.

The Court: Overruled.

Mr. Seaton: Exception.

[fol. 17] My name is John A. Malsed. I am an Investigator, Alcohol Tax Unit, Pittsburg, Kansas. I have been an

Investigator for about fourteen years. On the 3rd day of March, 1947, I, along with another Investigator, Special Investigator Creehan of the Alcohol Tax Unit, were parked on what is known as "Devil's Promenade Road" in the Northern portion of Oklahoma. That road is directly east of Quapaw, Oklahoma, and runs east there, and over a number of curves, across the bridge over Spring River, then continues east for about a mile and a quarter or a mile and a half where it jogs about a quarter of a mile south, and then continues on east into Missouri, over Missouri Highway 43; that is the highway from Joplin to Seneca, Missouri. We were sitting on this highway in an automobile. We saw the defendant, Virgil T. Brinegar; we saw this car the first time as it came around the curve in the road coming from the east. We were sitting about a quarter of a mile east of the Quapaw Bridge on this gravel road. The car passed us and as it passed as I recognized Mr. Brinegar as the driver of the car, I have seen him before, yes, sir.

Q. How many times before, please, sir?

A. Well, the first time I saw Mr. Brinegar I think was on September 21-23.

Q. And where did you see him please?

A. At Joplin, Missouri.

Q. What was he doing at the time you saw him?

A. At the time I saw him he was gathering up some liquor in a truck.

Q. Then did you see him another time?

A. I saw him on September 30.

Q. And what was he doing at that time, please, sir?

A. He was gathering up liquor in a truck.

Q. And did you arrest him on either occasion?

A. We arrested him on September 30.

Mr. Simms: I object to that.

The Court: Just a moment.

Mr. Simms: Sir?

The Court: I was giving you an opportunity to state the objection.

[fol. 18] Mr. Simms: I object to that as to the arrest, without showing a conviction. I think they could show a conviction but not just an arrest.

The Court: Objection sustained.

Q. Did you at any other time see the defendant with a load of liquor headed towards Oklahoma?

A. I saw him on September 23, and September 30, and then on March 3rd.

Q. And did you—well, strike that. Now, then, on this occasion when you saw him coming a mile down the road and he came by you, you recognized him because you had known him for sometime, isn't that true?

A. That's right.

Q. And you chased his car, didn't you?

A. That's right.

Q. As you had done the other?

A. Yes.

Mr. Seaton: Now, if Your Honor please—

The Court: Just a minute; do you object to that statement by counsel?

Mr. Seaton: Yes, sir.

Mr. Hughes: Well, I will withdraw that statement.

The Court: Objection sustained.

Well, as he came by I recognized the car which I had seen before in Joplin, and I recognized Mr. Brinegar. So Mr. Creehan was driving the car, so we started following Mr. Brinegar's car. He immediately began to increase speed. About at this Quapaw bridge, it had been washed out and the road isn't completely built up yet, although it is very passable. There are two curves, one very sharp curve going over the bridge. Mr. Brinegar took both of these sharp curves at a high rate of speed and made the bridge, went across the bridge, and he continued on, and on the west side of the bridge there are two or three more curves. The last one is about a mile—about a half a mile north, and goes up a hill. As the car went up the hill we were able to get up even with the car—before that time we weren't able to gain on him in speed. I wouldn't know how fast we were driving. I would say about 200 yards past the curve we were able to stop Mr. Brinegar. [fol. 19] I got out of the car and went up to Mr. Brinegar's car, and I said, "Well, Brinegar, how much liquor have you got in the car now." "Well," he says, "Not so much" or words to that effect. And on the floor of the car was one case of liquor; it was on the floor in the passenger's seat. This car was a 1946, six-cylinder Ford Coupe, and behind the coupe, in a compartment behind the seat, by lifting



up the seat, was a number of cases of whiskey and liquors, and a few lugs—what I mean by “lugs,” a package of liquor.

I told Mr. Brinegar that I had seen him in Joplin and he said he had been in Joplin, but that I had not seen him put any liquor in the car. I told him I had not seen him put any liquor in the car in Joplin that day. I do not know of my own knowledge whether this defendant has a wholesale or retail liquor dealer's stamp. He told me on the road out there that day that he has a retail liquor dealer's stamp, and a wholesale liquor dealer's stamp, and ask me if it would make any difference. I told him that it didn't make any difference. I said, “Well, you are not going to Hiwasse with this liquor.” He said he was going to Vinita with this liquor. Hiwasse is in Arkansas. He told me that he was going to drink the liquor. I had had conversations previously with him on drinking liquor, and I told him, I says, “Well, you drink an awful lot of liquor, by the amount of liquor you have been buying.”

#### Cross-examination:

The Quapaw Bridge is about five miles from the Missouri-Oklahoma line, and it has two or three hills on it. The road is straight from Missouri Highway 43 on over until you get to a—I suppose a correction line there about a mile or a mile and a quarter east of the Quapaw Bridge. It is not particularly wooded country, only in spots. There is a good deal of timber all the way, all along that road, especially in Missouri.

We were parked about I would say a quarter of a mile east of the bridge, on the straightaway. We were headed west. That was the direction that Mr. Brinegar was traveling. As he passed us I would say we chased him a mile [fol. 20] and a quarter or a mile and a half before he stopped. That road was rather crooked, had several curves in it.

I imagine when he passed us he was traveling possibly about thirty-five or forty miles an hour. That road is rough all the way across there. It had rained and in places, especially on the hills, the road was very slick. We started after him from a dead stop. I would say he was driving possibly thirty-five miles an hour; I could not determine exactly the speed of a car by sitting beside it. I don't know just how fast we were going at the time.

All I know, we were struggling to get up to him. I testified that he said he didn't have too much liquor, or words to that effect. I would not say exactly what words he said.

Mr. Creech was driving the car and I was on the righthand side. I was the first to get out of the car. We had stopped at the side of and to the front of Mr. Brinegar's car, and I walked back to his car. I said, "Hello, Brinegar," I said, "How much liquor have you got in the car?" I imagine that I was possibly ten or fifteen feet from the car when I spoke to Brinegar.

Q. Then, what did he do, if anything?

A. He got out of the car at that time. I looked in the car and saw the one case of liquor, and then I pulled up the seat and saw the other liquor underneath the seat. I never looked at the backend at all. I don't remember whether I asked if the backend was locked or not, but I don't believe that I did, because I don't think that I looked in the turtle-back at all. I asked him if he was going to Hiwassee with the liquor, and he said, no, he was going to Vinita this time. I asked him where he had obtained the liquor. Very evasively he said, "Over there." I asked him if he got this liquor at Springfield and he said no. I did not then ask him whether he had gotten it at Joplin. I asked him where he got it then. His reply was—very evasively he said, "Over there," as he pointed to the east. I said, "Over where?" He said, "Oh, right down there, right down the road there." It was about six o'clock in the evening when we saw this car.

By the Court:

Q. And, I believe you testified that you had seen him up in Joplin on that day?

[fol. 21] A. No, I said to him, "I have seen this car in Joplin" and he said he had been there that date, but I had seen this car before in Joplin and had followed it.

The Court: He said he had been in Joplin that day?

A. That's right.

The Court: Is that all that was said—anything said about what time he had been there that day or anything about it?

A. No, I never asked him what time.

The Court: But you had not seen him on that particular day?

A. On that particular day I had not seen him; Mr. Brinegar misunderstood me.

The Court: Until you saw him approach in this automobile?

A. Sir?

The Court: Until you saw him approach in this automobile?

A. That's right, that's the first time I saw him that day.

Redirect examination:

Q. Now, then, after you made a search of this car, Mr. Malsed, you placed the defendant under arrest, did you not?

A. Yes, sir. I accompanied Mr. Brinegar to Miami, Oklahoma. I drove the car into Miami and Mr. Brinegar was then turned over to the local agents of the Alcohol Tax Unit here.

Cross-examination:

Q. When did you place him under arrest, Mr. Malsed, as you have testified?

A. Do you mean as to time?

Q. Did you tell him that he was under arrest at any time?

A. Yes, I did.

Q. When?

A. It was after we searched the car and talked to Brinegar.

Q. About how long after you had stopped him on the road?

A. I would say 15 minutes or longer.

Q. After you made the search and talked with him?

A. That's right.

Q. Fully 15 minutes after you stopped the car?

A. I imagine it was that long.

[fol. 22] Q. Up to that time you had never said anything about arrest, is that true?

A. No, I don't believe I had, I possibly told him we would have to take him in.

Q. In that regard then, what was the conversation, Mr. Malsed?

A. What is—

Q. I say, what conversation—what did you say to the defendant here and what did he say if anything as to the arrest?

A. At what time.

Q. At the time that you say, 15 minutes afterwards, as to the arrest.

A. I told him we would have to take him in.

Q. And that is what you did?

A. Yes.

Q. And that's all that you said, was it?

A. That was about it.

Q. And where did you say you were going to take him; did you say?

A. I don't know as I said where we were going to take him.

Q. The only thing that you said was that "Brinegar, we have got to take you in," is that right?

A. We are taking you in, yes.

Q. All right.

A. Or words to that effect.

The testimony of Mark H. Creehan, offered on behalf of the Government and received in evidence, was in substance and effect as follows:

My name is Mark H. Creehan. I am a Special Investigator, Alcohol Tax Unit, Kansas City, Missouri. I was with Mr. Malsed on March 3, 1947, when we searched and arrested Virgil T. Brinegar. Our car was parked I would say approximately a quarter of a mile from the Quapaw Bridge by the side of the road. I first noticed the car in which Brinegar was riding as it rounded a curve which was approximately a mile east of our position. That is toward the State of Missouri. As this car passed our position I saw the car was weighted and loaded, and due to information received from my partner, Mr. Malsed, I started our car and gave chase. As this car in which Brinegar was riding passed our car he immediately increased his speed. We chased him approximately a mile or maybe more. I know it was a mile, before we were able to bring him to the side of the road. As I got close to the side of his car I sounded my siren and started pushing him over. He at the time would not stop. It was necessary for me to push him really over to the side of the road before he would stop. At that time Malsed got out of the car and approached Brinegar and said, "Brinegar, how much whiskey have you got on you?"—



"How much have you got on this time?" Brinegar says, "Not much; just a few cases for my own use." And I couldn't say definitely but I believe that was when he stated he had approximately eleven or twelve cases of whiskey. He says, "Where is it?" Incidentally, there was a case of Schenley on the floor, to the right of the drivers' seat. I think he directed our attention—I believe he directed our attention to the fact that it was in the rear of the seat—in the compartment. I then, after we found the whiskey in cases and lugs in the compartment, I believe that I requested his keys to look into the rear of the car—the turtle back. Malsed asked him where he obtained this whiskey and he said, "Oh, down there a little bit," pointing toward the east. He said, "Where down there?" "Oh," he said, "Down there a piece."

There was approximately between twelve and thirteen cases of whiskey in the car.

Q. Did you then place him under arrest?

A. Not until after the search, sir. In fact there was no formal arrest made until a little later; we were satisfied with our search, and we said "Well—" In fact, I think I advised Malsed to take him into Miami. He was taken into Miami. I didn't take him in—I went on further duty.

#### Cross-examination:

I didn't take him into Miami. The other officer took him in. Whether he drove the car I could not say.

Q. You never formally placed the defendant under arrest, did you?

A. As to so many words, no. As to placing our hands on [fol. 24] him, no. Well, I think there was some statement that was, "Well, you get in the car, come along with us"—something along that line; the exact words I don't remember. When we drove into Miami, when the car was driven into Miami Starett had arrived on the scene.

As to how fast the defendant was driving at the time that we got up even with him—well, I am—this is all conjecture on my part; I would say he was going approximately sixty miles an hour. The first thing I observed about the defendant or his car, is that his car was weighted or loaded. When I got even with his car I was only interested in pulling him over to the side of the road, and stopping him. The first time I observed any liquor was when I got to the side of the car. The door had been opened at that time and

the defendant had stepped out. Brinegar was talking to my fellow officer.

I made a search of the turtle back. I believe I requested the keys for that, sir, that was after the original search in which we found the liquor. I did not ask the defendant where he got the liquor. Malsed asked him that question. The same is true as to where he was taking the liquor.

Yes, I was driving the car. Mr. Malsed was on my right. Upon stopping our car Mr. Malsed got out of the car first. He went over to the defendant and the first questions asked were asked by Mr. Malsed. I had no conversation with the defendant outside of the presence, and out of the hearing of Mr. Malsed. All three of us were there. I heard Mr. Malsed testify that he had conversation with the defendant, and his testimony is in substance correct. I had very little conversation with the defendant, only a few questions. The turtle back might have been unlocked, I couldn't definitely say, but my recollection is that I requested the keys from Mr. Brinegar and opened it. I found nothing in there at all, sir. There were between twelve and thirteen cases of liquor in the car. It was located behind the front seat, but of course extended towards the rear.—Twelve cases occupy quite a bit of space. It was in about the center of the car and a little to the back, that is correct. Definitely, I don't know how much a case of whiskey in pints weighs, but I would say pints and fifths and so on would run any-[fol. 25] where on an average from forty-two to forty-eight pounds. This liquor was in pints and fifths.

Q. In regard to the case on the floor that you have testified, I will ask you if there wasn't a laprobe or something in the car there, a cover in the front seat of the car, a robe?

A. I don't recall it, sir.

Q. You don't recall that there was a robe in the car?

A. I don't recall at this time.

Q. You wouldn't say that there wasn't?

A. No, sir, I wouldn't; I know that I could see the case of Schenley.

Q. That was after you went over and Mr. Malsed was there?

A. Well, Mr. Brinegar had got out of the car when I—we make it a point to have the defendant get out so that he can't get away and get the car.

Q. In other words, as soon as the car was stopped you had Brinegar get out of the car, is that right?

A. No, I think the first conversation—maybe the first question that was addressed to Brinegar was addressed while he was in the car.

Q. But he immediately, he was taken out or ordered out of the car, isn't that right?

A. He was requested to get out.

Q. Requested to get out of the car?

A. Yes, sir. Yes, I had gotten out of my car then; as soon as my car came to a stop, I immediately got out also. I was on the left or driver's seat. I had to come around to his left. Both Mr. Malsed and I were on the left side of Brinegar's car. When Brinegar got out of the car I would say that Malsed and I were maybe a foot or each other; we were practically with each other at that time.

Q. Did you open Brinegar's car to let him out or did he open it himself?

A. Well, now, that I can't say, sir.

Q. You don't remember that?

A. No, I can't say that.

Q. You don't know just how far you were from the Brinegar car at the time he got out; in other words you were not leaning up against the car at the time Brinegar got out and the conversation wasn't had with Brinegar while he was in the car?

A. Some of the conversation, yes, the first questions were addressed to Brinegar when he was in the car.

[fol.26] Redirect examination:

Q. You didn't have Mr. Brinegar get out of the car until after he had made the statement, "I have some for my own use," did you?

A. No, sir.

The whiskey which we found in Brinegar's car was not removed. I left it in Brinegar's Ford. I am not able to identify that whiskey at this time.

The testimony of JOHN REED, offered by the Government and received in evidence, was in substance and effect as follows:

My name is John Reed. I am an Investigator, Alcohol Tax Unit, Tulsa, Oklahoma. I was not present with the two officers when defendant was arrested. I was called to

Miami, Oklahoma. At that time I interviewed the defendant. I also took into custody his car—a 1946 Ford. I took Government's Exhibits 1, 2 and 3 from the Ford Coupe driven by Brinegar. I marked this number 1366 on the side of the case. That number represents our Oklahoma Northern District case number, as to our Unit, for identification.

Mr. Hughes: If Your Honor please, I would like to introduce in evidence the three cases, Government's Exhibits 1, 2 and 3.

The Court: All right, they may be admitted.

On the 4th day of March I had a conversation with Mr. Brinegar. The Miami police brought Mr. Brinegar out of jail, up to the police station, and there is where I first met Mr. Brinegar and talked with him. Mr. Brinegar began talking to me about the liquor business and about the deal, and I explained to him that he didn't have to make any statement, that anything he said might be used against him. I asked him if he had an attorney; he was entitled to an attorney. He said he didn't have.

Brinegar said he left Vinita about noon and drove to Joplin with the idea of trading his automobile for a pickup truck. However, he didn't talk with any car dealers as he [f. 27] drove around the used car lots, and didn't see the type of truck he wanted, according to his statement. He said he had been in Joplin about two and one-half or three hours. I asked him where he procured this whiskey, and he said he was driving toward home from Joplin, and back a ways before he came to the Quapaw Bridge there was a fellow parked by the side of the road who stopped him and said, "Don't you want to buy some whiskey"; and the fellow offered him a pretty good price on it, and he just bought this load of whiskey. He said he didn't know who the fellow was, that he had never seen him before, and that he couldn't tell me what kind of automobile he was driving. He did not state to me why he was taking a cut-off or back road to get to Vinita. On the way down from Miami he told me that he had a wholesale and retail liquor dealer's stamp. I checked them at Mr. Brinegar's home in Vinita and found that wholesale liquor dealer's stamp No. 4173 and retail liquor dealer's stamp No. 164148 had been issued to Mr. V. T. Brinegar, 526 North Smith Street, Vinita, Oklahoma.

According to the addresses on the packages the Government's Exhibits 1, 2 and 3, were shipped to Joplin, Mis-



souri. On the package is Frankfort Distilling—Distributing Corporation for Southwest Missouri, Joplin, Missouri. We were not able to trace these cases because of the fact that all of the serial numbers had been removed from these packages. There was a serial number placed on these packages by the government storekeeper-gauger at the time this whiskey was put up, and could have been traced from the distiller to the distributor and from the distributor to the retailer, had those numbers been left on the packages. It is necessary to remove these numbers and destroy those numbers after the whiskey had been removed from the container. The whiskey together with the automobile are now in government storage here.

Cross-examination:

I saw Mr. Brinegar on March 4, 1947 in jail at Miami. Of my own knowledge I do not know when he was arrested. These cases of liquor were in a 1946 Ford Coupe, locked up [fol. 28] in storage in Miami, Oklahoma. I do not know whose car it was. I did not check the registration myself. The defendant told me he got the liquor in Oklahoma. He did not tell me that the man's car was broken down or that it had a flat tire or anything wrong. He said he was just driving down the road and the fellow stopped him. There is nothing on exhibits 1, 2 and 3 showing where they were sent to further than Joplin. These are the original packages from the distiller. They have not been opened. They are still sealed. I don't recall finding anything else besides the liquor in the car. There was probably some tools; I don't know. Mr. Smith stored the car. I just don't recall if I saw any wearing paraphernalia. I am not sure whether there were any blankets or any robes of any kind. There could have been, yes.

The Court: Mr. Reed, open that package and tell us what is in it, that exhibit 3; I believe it is.

A. Twenty-four pints of Four Roses, blended whiskey.

The Court: Tax paid?

A. Tax paid, yes, it has Missouri State stamp on it, also has the government revenue stamp.

On the way back to Tulsa I had a conversation with Mr. Brinegar and he said that the car was his.

The testimony of Henry R. Smith, offered by the Government and received in evidence, was in substance and effect as follows:

My name is Smith. I am an Investigator, Alcohol Tax Unit. I have been an Investigator since March 1, 1929. I was present with Mr. Reed when we went to Miami, for the purpose of taking into custody and seizure the defendant's automobile. I was present when Mr. Reed asked the defendant several questions. He did most of the questioning. That is at the Police Station—not what was said coming on in from down here. I drove the 1946 Ford Coupe to Tulsa, together with the liquor. I checked the purchase of the Ford, but not the record of the title. The motor company at Vinita sold this car to Brinegar. I can identify Government's Exhibits 1, 2 and 3. That is the whiskey that was in the 1946 Ford Coupe that belonged to Brinegar.

Cross-examination:

I made an inventory of the contents of the defendant's automobile. In addition to Exhibits 1, 2 and 3 I found about nine other cases of whiskey. It is inventoried as to pints and fifths; 192 pints and 60 fifths or 36 gallons. That is just a part of it. Anything else in the car is inventoried on the form of inventory. It is on the windshield of the car and also on the records. I don't recall from memory what else was in the car; probably some tools—generally is. As to whether I found any tools in the car—generally is some. If there were some, I did, and they are on the inventory. I cannot tell this jury from memory whether or not I found them. I can't say from memory whether I found any wearing apparel or not. It seems to me like there was one blanket of some kind, that was left in the car.

I heard the defendant say that he contacted a man up about the Quapaw Bridge somewhere and purchased a cargo of whisky from him. That is in Oklahoma.

Q. Would you say that he did or did not say that the car was broken down, had a flat or was stopped on the highway?

A. I wouldn't say definitely. I don't think he said anything about any car being broken down.

Q. But you don't know definitely whether he did or not?

A. No.

The testimony of F. B. KIRKES, offered by the Government and received in evidence, was in substance and effect as follows:

My name is F. B. Kirkes. I have a general merchandise store located four miles southwest of Joplin on Highway 166. In connection with my general merchandise store I engage in the sale of whisky and other liquors.

I do not recall when Mr. Brinegar was arrested on this occasion. I heard about his arrest. I had a conversation [fol. 30] with him subsequent to his arrest. Exactly when I had that conversation I don't know but it was several days after the Alcohol Tax Unit men had been in my store and this gentleman came by and bought some gasoline and told me that they had arrested him for having some whisky in Oklahoma and had asked me if the Alcohol Tax Unit men had been there and asked me had I ever sold him whisky and I replied, I told them I had on two or three occasions sold him a few bottles or a case of whisky. That is all the conversation to the best of my recollection.

I don't recall ever selling him as much as a case and a half of whisky at any time; I have sold him a case. I have a retail liquor dealer's stamp and it does not permit me to sell more than five gallons at a time.

We always remove the stamps and serial numbers on a case of whisky when it is sold. Just cut around the number with an ice pick. The serial numbers on Government's Exhibit 1 might have been removed from that with an ice pick—as to identifying it as a case that was positively sold from my store, no, sir, I couldn't.

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The testimony of JOHN A. MALSED, being recalled by the Government, and received in evidence, was in substance and effect as follows:

I know where the Southwest Missouri Liquor Company is located. It is located on South Main Street in Joplin, Missouri. The nature of their business is wholesale liquor dealers.

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Mr. Hughes: If your Honor please, the Government rests.

## MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Seaton: Comes now the defendant and moves the Court for an order of acquittal.

The Court: Overruled.

Mr. Seaton: Exception.

[fol. 31] The testimony of VIRGIL T. BRINEGAR, offered by the defendant and received in evidence, was in substance and effect as follows:

My name is Virgil Thomas Brinegar. I live at Vinita, Oklahoma; prior to that time I lived at Hiwasse, Arkansas.

On the 3rd day of March, 1947, I was stopped by the Alcohol Tax Unit Investigators about three miles east of Quapaw, Oklahoma, about a half or a mile west of the bridge. That is about seven or eight miles from the Missouri line. I had been in Joplin, Missouri, that afternoon looking to trade in my car for a ton truck. I drove around the used car lots and couldn't see any trucks I wanted. I went down to the Market Square to see a man who is a dealer in fruit and vegetables, but he wasn't there. I left Joplin about three or four o'clock.

Q. Just tell the court and jury when you were stopped there what happened?

A. Well, they crowded me off to the ditch *any* anyway to where I couldn't go no farther; I had to stop. And they jumped out—Mr. Malsed, I believe, is the man came back there and said, "Old Brinegar" or "Mr. Brinegar," or something to that effect; he says, "How much whiskey have you this time?" I says, "Not too much." Well, he says, "Get out of there." So I got out. Then he says, "Open that up." I says, "It isn't locked." He went around and raised up the turtle, and looked, and he didn't see no whiskey. He said, "Where is that whiskey?" I said, "I don't know." Then he raised the seat, which is on hinges, he looked under there; he says, "About eleven cases." Then he says, "Just a minute." "Well," he says, "Where did you get this—Springfield?" I says, "No, I didn't get it at Springfield." He says, "Well, where did you get it?" I says, "I got it back up the road." And then he told me—then he says, "I will see where you got it," something like that. He searched every pocket of my



clothes, watch pocket, or everything thought he would find some bill or something, I guess, to show where I got it—I don't know. Anyway, he didn't find none. Then he said, "Get in the car and sit down." I got in the car and sat down. Then he radioed to another car, which was ahead, he said, "I have got a man with about eleven cases of whis- [fol. 32] key." This man come down there and they talked together and Mr. Moffett taken me to Miami. He told the others, he said they came in after me, he said, "We will be in Miami before supper."

I bought the liquor between the bridge and the Missouri line from a fellow on the side of the road with a flat casing.

He asked \$500.00, I thought that was a good buy, and I bought it. I had a liquor stamp that had been purchased from the government.

The liquor was all under that seat excepting one case that was on the floor board on the right-hand of me, down kind of back up under the dash board, like; and it was covered with a laprobe.

Q. Why did you have it covered with a laprobe?

A. Why anybody that seen it would take it away from me, that is, a city officer, county officer—I would have been very foolish to haul that case of whiskey out there where people had seen it. That laprobe was a gray color, looks like a hide or something; the hair kind of stood out on it, although it isn't hair—it is imitation. It should be in the car yet if there haven't somebody made away with it.

There was no liquor in the turtle back.

#### Cross-examination:

I have been living in Vinita only a short time. I was not living there last September. My wife and child was living there at the time. The whiskey in the Ford was my whiskey. I bought it. As to telling the Agents that I was going to drink that whiskey, well, now I wouldn't say that; I might have joked something like that. I said I was going to drink it, something like that—of course, that is a joke. I intended to sell it. There are several main highways from Joplin to Miami to Vinita, Oklahoma. I went up on 66 to Baxter Springs, and went 166 into Joplin, I came back on this road, because I considered it nearer. I don't know exactly how many miles I would save by coming back on the diagonal. The road isn't paved. There was a fraction of

mud, not enough to interfere with driving; it is a gravel road. I really didn't think about the mud, and wasn't interfered with by the mud.

[fol. 33] If I see a man in trouble along the side of the road in daylight I usually stop. I have several times previously stopped when I saw a man with a flat tire. I have stopped quite frequently. This is not the first time that I have bought whiskey by the side of the road. I have sold some whiskey since June of 1946. I personally didn't think that I needed the wholesale dealer's stamp. I was talked into it. It cost \$110.00 and that's quite a bit for me. I believe I could make the statement to the Court and jury that on that afternoon when I was up in Joplin I didn't go into any liquor store at all, and it would be true. I did not buy any whiskey at all on that day in Joplin. I had a pint of whiskey in the glove compartment, that I had opened and taken a drink out of. My side line is fruit peddling. It is a side line to farming; I was originally a farmer. I do not know the name of the man whom I met on the side of the road—never had seen him before. He was driving a Chevrolet, I believe, about a '38 or '39 model. Offhand I would say that he was about twenty-seven or twenty-eight years old. I never had an opportunity to show the Government's Agents the place where I purchased the whiskey. If they had gone back at the time they could have caught the man who sold it to me. When I told them that I had purchased it back there, they asked no particulars about it.

I can't say that I increased my speed when this car started to chase me, because that bridge was rough. I would have been silly to increase my speed there and hit that rough bridge. I don't think I had a bit of trouble going over the bridge. My rule in driving is to pick up speed before I hit a hill; whenever I get on to a bridge I try to pick up speed for those hills. At the time I didn't know that this car was chasing me. I did see it though as I looked in the glass; I seen the car was coming after me.

Q. When did you first realize that the Alcohol Tax Agents were trying to stop you?

A. Well, I didn't realize it for sure until the siren blowed; when they blowed why, then, I had a good idea what it was.

Q. Will you state to the court and jury why you didn't stop when that siren blew?

A. Well, I released and stopped as quick as I could, I suppose.

[fol. 34] Q. They forced you off the road didn't they?

A. Oh, yes, they done that; of course, I didn't know whether they were hijackers or who they were until the siren blowed, I didn't know who they was.

I have bought whiskey in Missouri in cases. The Government had got quite a bit of it now.

#### Redirect examination.

The liquor I referred to that I bought in Missouri that the Government has is in Missouri. It is that liquor that the Government has at Joplin. Yes, sir, they have some of my liquor there now. I paid for this whiskey in cash, \$500.00. I transferred the whiskey from his car into mine there just beside the highway. The highway isn't traveled like 66; there isn't too much traffic on that road.

Mr. Seaton: Comes now, at the close of the case if Your Honor please, the defendant and moves the court for an order of acquittal.

The Court: Overruled.

Mr. Seaton: Exception.

#### Acknowledgment of Service

Now on this 15th day of July, 1947, the undersigned, Whit Y. Mauzy, United States Attorney, hereby acknowledges receipt of a copy of the Condensed and Narrated Statement of Evidence on Defendant's Motion to Suppress and copy of the Condensed and Narrated Statement of Testimony Introduced on Trial and hereby agrees to the inclusion of same in the record on appeal.

Whit Y. Mauzy, United States Attorney; Kenneth G. Hughes, Assistant U. S. Attorney, Tulsa, Oklahoma; Attorneys for Plaintiff.

[fol. 35] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS RELIED UPON ON APPEAL—Filed July 15, 1947

Comes now the above-named defendant, Virgil T. Brinegar and states his intention upon his appeal to the Circuit Court of Appeals for the Tenth Circuit, in the above case, to rely upon the following points:

### I

That the Court erred in refusing to sustain defendant's motion to suppress the evidence (Tr., p. 27).

### II

That the Court erred in allowing in evidence the testimony of the witnesses, John Malsed, Mark H. Creehan, John Reed, and Henry R. Smith, Investigators, Federal Alcohol Tax Unit, as to the finding and possession of tax-paid whiskey in defendant's automobile and erred in allowing in evidence government's Exhibits 1, 2 and 3, being cases of whiskey allegedly taken from defendant's car, over proper objection of defendant's counsel, for the reason that said testimony was based upon and said evidence obtained as a result of an unlawful arrest, and unlawful search and seizure without warrant or probable cause, and in violation of the Fourth and Fifth Amendments to the Constitution of the United States (Tr., pp. 32-51; 51-62; 62-73; 73-77).

### III

That the Court erred in failing to sustain defendant's motion for judgment of acquittal at the close of the evidence offered by the Government (Tr., p. 83).

### IV

That the Court erred in failing to sustain defendant's motion for judgment of acquittal at the close of all the evidence (Tr., p. 100).

### V

That the repeal of the Oklahoma "Permit Law" Chapter 2, of Title 37, Oklahoma Statutes 1941, and Chapter 2 of Title 37, Session Laws 1945 (O.S. 1941, Secs. 41-48 inclusive) [fol. 36] sive), by the Legislature of the State of Oklahoma



by the enactment of Enrolled House Bill No. 254 approved and effective April 24, 1947, effectively withdrew the conditions necessary to the applicability of the Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, 49 Stat. 1928, 27 U.S.C.A. Sec. 233), making the Federal Act inoperative and requiring the dismissal of the information in this cause, for the reason that the Circuit Court of Appeals for the Tenth Circuit is without jurisdiction to affirm the sentence imposed or further proceed to enforce said Act in regard to this cause.

Paul O. Simmis, Vinita, Oklahoma; Irvine E. Ungerman, Tulsa, Oklahoma, Attorneys for Defendant.

I, Whit Y. Mauzy, United States Attorney, hereby acknowledge receipt of a full, true and exact copy of the foregoing Statement of Points Relied Upon on Appeal.

Dated this 15th day of July, 1947.

Whit Y. Mauzy, United States Attorney; by Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma.

#### IN UNITED STATES DISTRICT COURT

DESIGNATION OF THE PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL  
—Filed July 15, 1947

To the Clerk of the District Court of the United States for the Northern District, State of Oklahoma:

Defendant, Virgil T. Brinegar, respectfully requests that in preparing the transcript on appeal herein to be transmitted to the United States Circuit Court of Appeals for the Tenth Circuit, you include the following designated [fol. 37] papers, matters and orders and portions of the record, and evidence, which are to be printed and made part of the record on appeal in this cause.

1. Information for violation of Title 27, Sec. 223, U.S.C.A., filed March 5, 1947.

2. Defendant's Motion to Suppress Evidence, filed May 5, 1947.

3. Clerk's record entries and minute on Court's order overruling motion to suppress, May 9, 1947.

4. Clerk's record entry and minute on arraignment and plea—May 9, 1947.

(The clerk's minute of defendant's plea to the information—not guilty—May 9, 1947.)

5. Clerk's record entry and minute showing trial by jury of this cause on May 13, 1947.

6. Clerk's record entry and minute or verdict of guilty filed May 13, 1947.

7. Judgment and commitment (30 days and \$100.00) entered May 16, 1947; filed May 20, 1947.

8. Notice of Appeal filed May 23, 1947.

9. Record entry showing notification to U. S. Attorney of Notice of Appeal.

10. Order Extending Time Within Which to File and Docket Appeal—filed June 25, 1947.

11. The testimony, proceedings and evidence adduced at the hearing on Defendant's Motion to Suppress: The Clerk is requested, instead of the question and answer testimony as it appears in the reporter's transcript of the witnesses, to include the Narrated Testimony, which is filed herewith.

12. The testimony, proceedings and evidence adduced at the trial. The Clerk is requested, instead of the question and answer testimony as it appears in the reporter's transcript of the evidence, to include the condensed and narrated testimony of the witnesses, which is filed herewith. (All other proceedings not included in the attached narration are to be omitted.)

13. Statement of Points on which Defendant Relies on Appeal.

[fol. 38] 14. This designation of record, etc., to be included in record on appeal.

Irvine E. Ungerman, Tulsa, Okla., Paul O. Simms,  
Vinita, Okla., Attorneys for Defendant.

The undersigned, Whit Y. Mauzy, United States Attorney, hereby acknowledges receipt of a copy of the above and foregoing Designation of Record on Appeal, and hereby agrees to same. Done this 15th day of July, 1947.

Whit Y. Mauzy, United States Attorney; Kenneth G. Hughes, Asst. U. S. Attorney, Tulsa, Oklahoma,  
Attorneys for Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted.

First Day, November Term, Wednesday, November 5th, A. D. 1947. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Irvine E. Ungerman, Esquire, appearing for appellant, Kenneth G. Hughes, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

#### Opinion.

(Argued November 5, 1947, Decided December 10, 1947)

Irvine E. Ungerman (Paul O. Simms and Charles A. Whitebook were with him on the briefs) for appellant.

Kenneth G. Hughes, Asst. U. S. Atty. (Whit Y. Mauzy, U. S. Atty., was with him on the brief) for appellee.

Before Phillips, Huxman, and Murrah, Circuit Judges.

Phillips, Circuit Judge, delivered the opinion of the court.

This is an appeal by Brinegar from a judgment of conviction for a violation of the Liquor Enforcement Act of 1936, 27 U.S.C.A. § 223.

The sole ground<sup>1</sup> for reversal urged is the denial of a motion to suppress evidence obtained by a search and seizure. At the hearing on the motion, Brinegar testified that on March 3, 1947, while driving a 1946 Ford coupe, he was apprehended by two investigators of the Alcohol Tax Unit about three miles east of Quapaw, Oklahoma; that the investigators searched the coupe and found a number of cases of whisky therein; that they seized the coupe and the

<sup>1</sup>In their brief, counsel have contended that the conviction could not stand because of the repeal of 37 O. S. A. §§ 41-48, but that ground was abandoned at the oral argument.

whisky; that no search warrant was served upon him, and that he did not consent to the search; that one case of whisky was in the front seat, but was covered with a lap robe; that the remainder of the whisky was back of the front seat but could be exposed to view by raising the seat.

The following facts were established by the testimony of Malsed and Creehan, investigators for the Alcohol Tax Unit, at the hearing on the motion to suppress: On March 3, 1947, the investigators were working on the north boundary line of Oklahoma. Malsed knew Brinegar. He had arrested him on September 30, 1946, "for hauling liquor." On other occasions, he had seen him loading intoxicating liquor into an automobile at Joplin, Missouri, and for some time he had known him as a "liquor hauler." The investigators were in an automobile parked on the side of the road about one-fourth of a mile east of the Quapaw bridge. The road there runs east and west. The investigators observed a Ford coupe approaching from the east. Malsed recognized Brinegar as the driver of the coupe as it passed the point where the investigators were stationed. The coupe appeared to be heavily loaded. Upon passing the investigators, Brinegar increased his speed and the investigators started in pursuit of him. After it had crossed the bridge, the coupe began skidding on a curve and Brinegar slowed down. Up to the time the coupe skidded, the investigators, although traveling at the maximum speed of their automobile, were unable to gain on Brinegar. When Brinegar slowed down, the investigators drove up alongside of the coupe and Creehan sounded the siren. Brinegar then stopped on the side of the road. The investigators alighted from their automobile and Malsed asked Brinegar, "How much liquor have you got in the car this time?" Brinegar replied, "Oh, not so much." In response to further questioning, Brinegar stated there were about 12 cases of whisky in the coupe. Brinegar further stated that he had both a wholesale and a retail liquor dealer's stamp and asked if that would help him. The investigators then searched the car and found 13 cases of whisky. One case of Schenley's was on the floor to the right of the driver's seat in full view of the investigators; the remainder of the whisky, except a partially consumed bottle on the seat, was back of the seat. The



search in its entirety took place after the incriminating statements had been made by Brinegar. The investigators testified that such statements were made by Brinegar before they placed him under arrest.

The testimony of the investigators with respect to the statements made by Brinegar was not objected to on the ground that they were not voluntary nor on any other ground; neither did Brinegar testify or otherwise assert at the hearing on the motion to suppress that such statements were not voluntary. At the conclusion of the testimony, the trial court made an oral finding that such statements were voluntary and that finding was not challenged below. The motion to suppress was denied.

Whether there was a technical arrest before the statements were made by Brinegar may be doubted. In *Jenkins v. United States*, 10 Cir., 161 F. 2d 99, 101, the court said:

"To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained."

But we deem it unnecessary to decide whether there had been a technical arrest at the time the statements were made. At least, the investigators had pursued Brinegar, sounded their siren, and had caused him to stop, and they were questioning him as a suspect when the statements were made.

We are of the opinion that the facts within the knowledge of the investigators and of which they had reasonable trustworthy information prior to the time the incriminating statements were made by Brinegar were not sufficient to lead a reasonably discreet and prudent man to believe that intoxicating liquor was being transported in the coupe, and did not constitute probable cause for a search.<sup>2</sup> Neither were such facts sufficient, in our opinion, to induce an ordinarily prudent and cautious person, under the circumstances, to believe in good faith that Brinegar had committed a felony

<sup>2</sup>Von Patzoll v. United States, 10 Cir., 163 F. 2d 216, 220, and cases there cited.

so as to constitute probable cause for the investigators arresting Brinegar without a warrant.<sup>3</sup> However, the statements made by Brinegar, together with the facts theretofore known by the investigators, if the investigators were warranted in acting upon such statements, were sufficient to lead a reasonably discreet and prudent man to believe that intoxicating liquor was being transported by Brinegar into Oklahoma and, since it was not practicable for the investigators to obtain a search warrant, justified the search and seizure of the whisky and the arrest of Brinegar.

The question presented then is whether the investigators, having sufficient information to suspect Brinegar, but not sufficient information to constitute probable cause for a search of the coupe and the arrest of Brinegar, could, after stopping him and interrogating him with respect to whisky in the coupe, lawfully act upon the information obtained as a basis for probable cause for the search and seizure.

If the statements made by Brinegar to the investigators could have been properly introduced in evidence against Brinegar at a trial on the criminal charge, then we think they, with the other facts known to the investigators, constituted adequate basis for probable cause for search and seizure by the investigators.

A confession or an incriminating statement made by a person is not involuntary merely because made while such person is in custody after arrest.<sup>4</sup>

"The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process."<sup>5</sup> Neither will the fact that the arrest, under which the person was taken into custody,

<sup>3</sup>Papani v. United States, 9 Cir., 84 F. 2d 160, 163;

Wisniewski v. United States, 6 Cir., 47 F. 2d 825;

Stacey v. Emery, 97 U. S. 642, 645;

United States v. One 1941 Oldsmobile Sedan, 10 Cir., 158 F. 2d 818, 819.

<sup>4</sup>Pierce v. United States, 160 U. S. 355, 357;

Wan v. United States, 266 U. S. 1, 14;

Lyons v. Oklahoma, 322 U. S. 596, 601.

Lisenba v. California, 314 U. S. 219, 240.

Cf. United States v. Mitchell, 322 U. S. 65.

<sup>5</sup>Lyons v. Oklahoma, 322 U. S. 596, 601.

was illegal, in and of itself render a confession or an incriminating statement involuntary." The test is whether, under all the facts and circumstances, the confession or incriminating statement was voluntarily made."

We do not regard *McNabb v. United States*, 318 U. S. 332, to hold otherwise. In *United States v. Mitchell*, 322 U. S. 65, 67, the court said:

"In the circumstances of the *McNabb* case we found such an appropriate situation, in that the defendants were illegally detained under aggravating circumstances; one of them was subjected to unremitting questioning by half a dozen police officers for five or six hours and the other two for two days. We held that 'a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' \* \* \* Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand."

Concluding, as we feel we are compelled to do, because of the findings of the trial court and the facts disclosed by this record that the statements made by Brinegar were not coerced by the action of the officers, but were voluntarily made, we hold that such statements would have been admissible against Brinegar on a trial on the criminal charge

<sup>6</sup>*Gilmore v. State*, 3 Okl. Cr. 434, 106 P. 801, 803.  
*People v. Klyczek*, 307 Ill. 150, 138 N. E. 275, 277;  
*People v. Vince*, 295 Ill. 419, 129 N. E. 193, 195;  
*Hicks v. State*, — Ind. —, 11 N. E. 2d 171, 177;  
*Quan v. State*, — Miss. —, 188 So. 568, 569;  
*State v. Hoskins*, — Mo. —, 36 S. W. 2d 909, 910;  
*Balbo v. People*, 80 N. Y. 484, 499;  
*People v. McFarland*, 386 Ill. 122, 53 N. E. 2d 884, 887.  
 See, also, *State v. Zukauskas*, 132 Conn. 450, 45 A. 2d 289, 293;  
*Sykes v. United States*, C.C.A.D.C., 143 F. 2d 140.  
 Cf. *R. v. Thornton*, 1 Moody, C.C. 27.

<sup>7</sup>*Young v. United States*, 5 Cir., 107 F. 2d 490, 492;  
*Ruhl v. United States*, 10 Cir., 148 F. 2d 173, 176;  
*Bram v. United States*, 168 U. S. 532, 542.

and that such statements, together with other facts known to the investigators, constituted probable cause for a search of the coupe, and, since it was impracticable for the officers to obtain a search warrant, that the search was lawful.<sup>8</sup>

Affirmed.

Huxman, United States Circuit Judge, dissenting:

I think the fair interpretation of the evidence is that Brinegar's reply to the officer's inquiry as to how much liquor he had was "Not too much." Brinegar testified that his reply was "Not too much," while Malsed, the officer who asked the question, testified that Brinegar replied, "Not so much," or words to that effect. But I attach no particular significance to the exact words of his reply. In my opinion, the decision in this case does not turn upon whether the statement by Brinegar, after he was stopped and interrogated by the Alcohol Tax Unit agents, was voluntary or involuntary, or whether it was of such an unequivocal nature as to constitute probable cause for believing that he had liquor which he was transporting in violation of the Federal Law. By the admission of the agents themselves, they did not pursue this car for the purpose of arresting Brinegar. Their testimony makes that very clear. They had no warrant for his arrest. They did not see him commit an act of law violation which would have warranted them in arresting him without a warrant, and they testified that they did not arrest him for fully fifteen minutes after they had stopped him, interrogated him, and found the whisky. What for then did they pursue him down the road with their siren screeching and crowd him off the highway, place him under restraint, and make it impossible for him to proceed. There can only be one answer—to ascertain whether he had whisky. Ascertaining this constituted a search. Is there any one so naive as to believe that if he had answered that he had no whisky, that they could have apologized, begged his pardon for having violated his constitutional rights as well as their oath.

<sup>8</sup>See *Morgan v. United States*, 10 Cir., 159 F. 2d 85.



of office to respect the Constitution, and permitted him to proceed. That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant. In other words, they intended to search this car, and the search was on when the chase began and Brinegar was crowded off the road and prevented from going his lawful way as far as the Alcohol Tax unit agents were concerned.

In *Nueslein v. District of Columbia*, 115 F. (2d) 390, a taxicab had struck a parked car. The officers found the taxi parked about a block and a half from the scene of the accident; they also found the identifying license of the driver. They either opened the door of the house where the car was parked or entered the open door and called out the name of the driver of the cab. He answered from upstairs and stated that he would come down. When he came down, the officers interrogated him and he admitted that he had driven the car and had a drink of beer prior thereto. The court held that the officers were engaged in a search of the premises.

In *U. S. v. Hanley*, 50 F. (2d) 465, the agents stopped a truck, ordered the driver to pull over to the curb, then boarded the truck to interrogate him and obtained an admission that he had a load of beer. The court held that this constituted a search. The facts in this case are indistinguishable in principle from those in these two cases. In the *Hanley* case, the truck was stopped and boarded for the purpose of interrogating the driver. Here it was stopped, forced to the roadside and surrounded for the purpose of interrogating the driver. As the court said in the *Nueslein* case when the officers entered the house, "They were just investigating. They were still legally investigating when the defendant told them that he was driving the cab at the time of the accident." So here the officers were illegally investigating when they pursued the car, forced it to the side of the road, compelled it to stop, and interrogated the driver. If the acts of the officers in

the Nueslein case constituted a search, the acts of the officers in this case likewise constituted a search.

There is a line of case distinguishable upon the facts from the above cases. In *Poulas v. U. S.*, 95 F. (2d) 412, the defendant was sitting in his parked car when officers came up and questioned him; and he admitted that he had whisky. In *Jenkins v. U. S.*, 161 F. (2d) 99, the officers followed a truck until it stopped, then drew up behind it, got out and questioned the occupant, and obtained an admission from him. In none of the cases did the officers pursue the defendant under the belief that they had a probable cause for searching the automobile without a warrant or under circumstances justifying the conclusion that they were pursuing or stopping the defendant for the purpose of searching his car.

The facts in the Morgan case are not nearly as strong on the question of pursuit as they are in this case. But in any event, this precise point was not raised or decided in that case. The only question discussed and the only thing said was that the admission was voluntary and constituted probable cause for the search. Whether the result of the search could be used as evidence because obtained in violation of the Fourth Amendment was not alluded to nor decided in that case.<sup>1</sup> The Morgan case is no authority for the proposition that a voluntary admission, obtained while officers were engaged in a search in violation of the Fourth Amendment, is admissible.

As pointed out by the present Chief Justice of the Supreme Court, who wrote the opinion in the Nueslein case, there is a conflict between the Federal Rule and the common law rule, as well as the rule of a number of State courts as to the admissibility of voluntary statements obtained while officers were engaged in conducting a search in violation of the Fourth Amendment. Under the Federal Rule, such statements are inadmissible.<sup>2</sup> The admission upon which the Government relies was obtained while agents were engaged in an illegal search of Brinegar's car. The right

<sup>1</sup>In addition to the Nueslein case, see also *U. S. v. Setaro*, 37 F. (2d) 134; *In re Oryell*, 28 F. (2d) 639; *In re Fried*, 161 F. (2d) 453.

of a citizen to be secure from unreasonable searches is not limited to homes. It applies as well and with equal force to "their persons, . . . papers and effects."

I subscribe fully to the philosophy of the *Nueslein* case. The personal guarantees of the Constitution are sacred rights. They are the things for which men have died throughout the centuries. Without them in the Constitution, it could not have been adopted and our present system of Government could not have been formed. Whenever a violation of one of these rights is involved, all reasonable presumptions should be resolved against one charged with a violation thereof and the burden should be placed upon him to bring his conduct clearly within the Constitutional power.<sup>2</sup>

Of course, officers should not be unduly restricted in their efforts to enforce the law, but in no instance are they warranted in violating constitutional immunities in their efforts to enforce the law. Having taken an oath to uphold the law, they should respect the rights of citizens guaranteed thereunder and should not, in their zeal, violate such rights. There is no conduct more unwarranted or offensive than to have an officer, who has taken an oath to uphold the law, pursue a citizen down the road, force him to the ditch, and interrogate him, all without probable cause, in the hope that he may obtain an admission ordinarily admissible under the Fifth Amendment, while engaged in violation of the Fourth Amendment.

I would, accordingly, reverse and remand with direction to sustain the motion to suppress.

#### Judgment.

Fifteenth Day, November Term, Wednesday, December 10th, A. D. 1947. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

<sup>2</sup>*Nueslein v. District of Columbia*, 115 F. (2d) 690;

*Gibson v. U. S.*, 149 F. (2d) 381;

*U. S. v. Ruffner*, 51 F. (2d) 579;

*In re Fried*, 68 F. Supp. 961.

*Go-Bart Co. v. U. S.*, 282 U. S. 344.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On ~~consideration~~ whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Virgil T. Brinegar, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

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On December 17, 1947, an order was entered granting a ten day extension of time for appellant's petition for rehearing.

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## PETITION FOR REHEARING.

Order Denying Petition for Rehearing.

Twenty-eighth Day, November Term, Friday, January 2nd, A. D. 1948. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied, Honorable Walter A. Huxman, Circuit Judge, dissenting.

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On January 8, 1948, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

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On January 20, 1948, an order was entered recalling the mandate and staying the reissuance of the mandate for thirty days.

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Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the District Court of the United States for the Northern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3518, wherein Virgil T. Brinegar was appellant, and United States

of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 23rd day of January, A. D. 1948.

(Seal, U. S. Circuit  
Court of Appeals,  
Tenth Circuit)

ROBERT B. CARTWRIGHT,  
Clerk of the United States  
Circuit Court of Appeals, Tenth  
Circuit.

[fol. 63] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 8, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on Cover:] Enter Leslie L. Canner. File No. 52781 U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 551. Virgil T. Brinegar, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed January 27, 1948. Term No. 551 O. T. 1947.

(5515)